United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Orig w/affidavit of mailing

75-1395

To be argued by
BERNARD J. FRIED

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1395

UNITED STATES OF AMERICA,
Appellee,

—against—

OSWALDO ALFONSO-PEREZ,
Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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2

TABLE OF CONTENTS

TABLE OF CASES

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Preliminary Statement

Appellant Oswaldo Alfonso Perez, also known as "Alfonsito" appeals from a judgment entered November 17, 1975, in the United States District Court for the Eastern District of New York (Watson, *J.*[1]), after a five week jury trial, convicting him of conspiracy to import heroin and cocaine into the United States for the purpose of distribution. Title 18, United States Code, Sections 173 and 174. Appellant was sentenced to a 15 year term of imprisonment pursuant to 18 U.S.C. 4208(a)(1) and fined $15,000. Appellant is presently incarcerated.[2]

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[1] Of the United States Customs Court; sitting by designation.

[2] On January 15, 1976, appellant was sentenced to a concurrent 3 year prison term in the S.D.N.Y. on a plea of guilty to a charge of obstruction of justice (75 Cr. 773).

There is no dispute on this appeal as to the sufficiency of the evidence upon which appellant was found guilty. However, he makes the following claims: (1) that it was error for the trial court to have permitted the testimony of a witness whose existence had not been disclosed in advance of trial, and also because of missing documents relating to this witness; (2) that it was a denial of due process for the prosecutor to fail to disclose that an accomplice witness had had a fight with fellow inmates; (3) that there was improper comment in summation upon the defendant's failure to testify; and (4) that the trial court erred in its charge in several respects.

Statement of Facts

1. The Government's Case

Introduction

This case involves an organization headed by appellant and his close associate, Domingo Abreu major narcotics dealers who, between the period December 1969 and August 1970, dealt in large quantities of heroin and cocaine.[3] The evidence established that appellant and Abreu obtained the cocaine from sources who brought it into the United States from South America. It was also established that they distributed quantities of both heroin and cocaine within the United States.

The Government's case was based on the testimony of accomplices who, individually or with others, had numerous narcotics dealings with appellant. Claudina Leiros, a convicted Cuban narcotics trafficker, whose Chilean cocaine "connection" was one Luis Ureta-

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[3] Abreu was a fugitive at the time of the trial and remains so.

Morales, provided the details of a March 1970 importation of two shipments totalling 21 kilograms of cocaine destined to be sold to appellant's customers. She also testified about one kilogram of heroin that was sold to one Rene Rosquette by appellant in December 1969. Leiros' testimony was corroborated by that of Rosquette and Ureta.

Another participant in the conspiracy who testified was Wilfredo de Jesus Risco Dominguez, also known as Raul Alvarez, a convicted Cuban narcotics trafficker and convicted murderer. He testified that he had received a total of 2 kilograms of cocaine and 2 1/2 kilograms of heroin from appellant Alfonso during April and July 1970. This testimony was essentially uncorroborated.

In addition, there was testimony that during the period of the conspiracy, appellant attempted to negotiate a 50 kilogram cocaine deal with Ureta and that during the same period he sent a trusted associate, co-defendant Domingo Abreu, to Spain to reestablish appellant's French heroin "connection".

Appellant, with the aid of Claudina Leiros, sells one kilogram of heroin to Rene Rosquette.

Claudina Leiros, who had first met appellant in 1962 in Puerto Rico, renewed her acquaintance with him in November 1969 when she met him and a Domingo Abreu at the La Boracca Bar. (She had also known Abreu since approximately 1962.) The two men, Leiros, and another girl, all went to Leiros' apartment located at 310 E. 55th Street (536-537, 541). At the apartment, Leiros, who at that time was actively engaged in cocaine trafficking, asked Abreu to go into "partnership" with her because her associate, Rene Rosquette, was moving to Florida and she needed another man to help her obtain customers.

Abreu agreed to do so, indicating there would be no problem since he was working with appellant (544-545).

Thereafter, throughout December, Leiros met almost daily with appellant and Abreu (577-578). On one occasion, towards the beginning of December 1969, while appellant and Abreu were visiting at Leiros' apartment, appellant told her that he had one kilogram of heroin left over from his "last shipment" and offered it to her. She stated that Rosquette was coming over and that perhaps he would buy the heroin (546-547).

A short while later, Rosquette arrived and agreed to purchase the one kilogram of heroin from appellant, who offered it for $14,000, stating that it could be cut "7 to 8 times." Arrangements were made for Abreu to deliver the heroin to Rosquette the following day at a nearby bar. As planned, on the following day Rosquette received the heroin and paid Abreu $14,000 cash (548-549, 1013-1022).

The importation of 18 kilograms of cocaine through Luis Ureta-Morales.

During either November or December 1969, Leiros' Chilean source for cocaine, Luis Ureta-Morales was introduced to Abreu at Leiros' apartment. Ureta stated that he was travelling to South America for Christmas and would be able to bring approximately 18 kilograms of cocaine when he returned to the United States in February 1970. He offered this cocaine at $9,000 per kilogram and Abreu stated that there would be no problem with payment (579-580, 1200-1201). Ureta then travelled to South America (1202).

While in South America, Ureta made arrangements to have approximately 18 kilograms imported from San-

tiago, Chile to the United States (1205). On February 5, 1970, Ureta returned to New York City and met at Leiros' apartment with Abreu and Leiros. Ureta told them that the cocaine would be brought shortly to Miami by his associate, Alberto Jarra, who would then transport it to New York City. Abreu stated that this would not be necessary; that he (Abreu) would handle the transportation to New York. Abreu also told Ureta that while they were in Miami he would introduce him to a "very big" narcotics trafficker (582-583, 1205-1208).

A few days later Ureta and Leiros flew to Miami. Abreu flew to Miami on the same day; however on a different flight. Following their arrival in Miami, Leiros met appellant at her Miami apartment and told him she had travelled with Ureta, her Chilean "connection", to receive the expected 18 kilograms of cocaine. Appellant wanted to meet Ureta, but Ureta, when so advised stated that he would wait for the arrival of his associates from South America before meeting appellant (583-586, 1209-1210).

While waiting for the associates to arrive from South America, Ureta continued to meet regularly with Abreu and Leiros. On one occasion, while with Abreu, Ureta was told that he should meet appellant. Ureta replied that he was not very interested because he had had no problems with Claudina. Thereupon, Abreu stated, "look, I work for 'Alfonsito' [appellant], and this man is one of the biggest narcotics buyers that there are here. He put me in contact with Claudina [Leiros] so that I would help her, Claudina [Leiros], to dispose of the cocaine that you are supplying us with." Abreu, explaining to Ureta, stated that the appellant wanted to meet "the man that is supplying the cocaine, because [he] had thought it was a small operation, and this is big, and

[he] want[ed] [his] share in the business."[4] It was agreed that when Ureta's associates arrived, all would meet with appellant (1212-1213, 1217-1220).

On February 10, 1970, Ureta's associate, Alberto Jarra, arrived in Miami, Florida, from South America (587, 1227). Then, on February 15, 1970, Ureta's second associate, his brother-in-law Rudolfo Torres, arrived in Miami from South America (587-1231). Torres was against meeting appellant and Ureta told this to Abreu, who replied "well, all the merchandise that I have sold, that you have delivered to Claudina has been sold to friends that Alfonsito [appellant] has in New York. Otherwise, if you don't agree to go talk with this man Alfonsito, I have no way of selling the 18 kilos that will soon be arriving in Miami." They agreed to meet appellant (1232-1233).

Ureta meets appellant.

Shortly thereafter, perhaps the next day, a meeting was held at Leiros' Miami apartment. Present were appellant, Abreu, Leiros, Ureta and his two associates, accompanied by one of their girlfriends. Initially, the 18 kilograms of cocaine, which were expected to arrive any day, were discussed. After some disagreement over the price, appellant agreed to pay Ureta $9,000 per kilogram and told him to have the cocaine delivered to Abreu, who would make the necessary payment. Appellant then proposed to purchase 50 kilograms of cocaine from Ureta, to be delivered in either Peru or Colombia for $5,000 per kilogram. According to appellant, if Ureta was inter-

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[4] On one occasion, Abreu took Ureta to an apartment where they obtained a quantity of cocaine for their personal use; in the apartment Abreu showed Ureta approximately one kilogram of heroin and said the narcotics he and appellant had purchased recently were of poor quality (1229-1230).

ested, he (appellant) would transport the cocaine to the United States using crop dusting planes. Appellant said that at the same time, he could bring in the same amount for Ureta. Ureta replied that he would have to think it over because he would have to invest a lot of money for a relatively small profit. (The cocaine cost Ureta $3,000 per kilogram in Chile and would cost another $1,000 per kilogram for transportation to either Peru or Colombia). Appellant concluded the meeting by telling Ureta that if he was interested to "let Abreu know," and that in the meanwhile, he should "deliver the cocaine to Abreu." He said, "I will be responsible for the transaction. I don't see the cocaine and I don't give you the money. Abreu is the one in charge of that" (588-594, 1234-1237).

Thereafter, Ureta learned that problems had arisen with respect to the shipment of the cocaine. Consequently, on February 22, 1970, he returned to Chile to insure the smooth importation of the cocaine (1240-1241). On February 28, Abreu departed for Spain to make plans for the future importation of heroin by appellant.[5] Abreu returned on March 5 (1445; Gov't. Exh. 23).

The 10 kilograms of cocaine from "Domingo the Chilean".

After Abreu left for Spain, Leiros remained in her apartment in New York City. In early March 1970, a

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[5] Abreu told Ureta and Leiros that he was going to Spain to renew a heroin connection on behalf of appellant (596, 1239-1240). Subsequent to his return, he told Leiros that everything had turned out fine and that an agreement had been reached. (623-624). Indeed, after Ureta returned in March 1970 to the United States (*infra*), Abreu also told him the trip had been a success and offered Ureta 10 kilograms of heroin at $3,800 per kilogram if Ureta would go through with appellant's 50 kilogram cocaine proposition in Peru or Colombia. Ureta declined the offer (1251-1252).

man named "Domingo the Chilean" came to see her and said that he had been sent by Selin Valenzula, a sometime cocaine source of Leiros, to meet with Rene Rosquette about a shipment of cocaine. He had been instructed to contact Leiros if he could not locate Rosquette. Since "Domingo the Chilean" was instructed to offer the cocaine first to Rosquette and Leiros wanted some of it, they both travelled to Miami to meet with Rosquette. During this meeting, Rosquette instructed him to give Leiros 10 kilograms, at $9,000 per kilogram, when the shipment arrived in Miami (607-613, 1032-1034).

A couple of days later, Leiros met the appellant at her apartment in Miami and told him that she had just arranged to receive 10 kilograms of cocaine in Miami and proposed that he help her with it. Appellant agreed to do so and told her to work it out with Abreu who would handle the transportation and sale in New York City (618-620). She thereafter met Abreu, who had just returned from Spain, and advised him of the additional 10 kilograms of cocaine that would be delivered in Miami (621).

Several days later, Leiros, having returned to New York, was contacted by "Domingo the Chilean" and told her to return to Miami because the cocaine was about to arrive. She did so and got in touch with appellant, informing him of the impending delivery. Appellant instructed her to come to his house when the cocaine had arrived and that he would make the necessary arrangements with Ivo Abreu, Domingo Abreu's brother, who would be taking the cocaine to New York City. "Domingo the Chilean" then delivered the 10 kilograms of cocaine to Leiros at her apartment in Miami and she went to see the appellant. Appellant told her to return to her apartment and wait for him. A short while later appellant came by, and tested the cocaine. He remarked that it was "good" and told her to wait for Ivo, whom

he would send right over. Ivo arrived and took the cocaine to New York City. Leiros then also returned to New York (630-643).

In New York City, the cocaine was stored at Leiros' "stash pad" located at the apartment of one Andres Rodriguez (644). Thereafter, the $90,000 was paid to "Domingo the Chilean" by Leiros, using monies brought to her by Domingo Abreu (645, 647).

Ureta delivers the 18 kilograms of cocaine.

Following his February 22, 1970 return to South America, Ureta was able to untangle the problems with the shipment of cocaine. Thereafter, on March 19, 1970, with the aid of several Chilean couriers, the 18 kilograms of cocaine was smuggled into the United States at San Diego, California inside a wheel and a spare tire of an automobile. Upon arrival in San Diego, the cocaine was first taken out of the spare tire and brought by Ureta and another to New York City. They flew from San Diego to the John F. Kennedy International Airport, Queens, New York. This cocaine totalling approximately 10 kilograms, was delivered to the "stash pad." Later that same day, the balance of the cocaine, which had been packed in the wheel, was brought to New York and also delivered to this location. This remaining portion of the 18 kilograms shipment, had hardened because of the heat built up in the turning wheel and it was reground by Ureta. Almost one-half of the weight, however, was lost (1241-1242).

Ureta met with Leiros and Abreu and told them what happened; he showed the damaged cocaine to Abreu. Abreu did not want this portion of the shipment, however, Ureta said "either you buy it all or you don't buy any." As a result, they agreed to take the entire shipment. Thereafter, during the following days, Abreu and Leiros

paid the monies for this cocaine to Ureta; a balance of $13,000 was unpaid until after Ureta returned to South America on March 28, 1970. It was then paid to an associate of Ureta who had remained in New York City.[6]

This was the last transaction that Leiros and Ureta had with appellant and Abreu (650).

Appellant's drug dealings with Wilfredo de Jesus Risco Dominguez ("Risco").

In November 1969, Wilfredo de Jesus Risco Dominguez ("Risco") flew from Colombia to New York City carrying with him one kilogram of cocaine concealed on his person (110-114). While attempting to find a buyer for this cocaine, he met appellant, whom he had known since 1963, in the La Boracca Bar and offered the cocaine to appellant. However, appellant, for reasons not disclosed to the jury, stated that he was unable to purchase the cocaine and asked Risco to meet him again (94, 116, 175-176).

Thereafter, a few days prior to Risco's December 27, 1969 departure from New York City, he again met appellant at the La Boracca Bar. Appellant stated that he had solved his problems and gave Risco his home telephone number in Miami, Florida, and said he could be contacted there for future drug deals (176-178).

On April 12, 1970, "Risco" travelled from Colombia to Miami, Florida. Following his arrival, he called appellant at the telephone number he had received from him at the La Boracca Bar in December 1969. As a

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[6] On one occasion, while Ureta was at Leiros' apartment, he saw "Domingo the Chilean", who had come to collect a portion of his money (624-630, 646, 1248-1254).

result of this call, Risco went to appellant's home in Miami and said that he (Risco) had no money and needed someone to back him in establishing a South American narcotic connection; however appellant, at the time, was not interested. Risco stated that he wanted to purchase some heroin or cocaine, that he had $8,000 to pay down, and needed credit for the balance. Appellant replied that he was working with Domingo Abreu and Carlos Lorenzo, both individuals who Risco had known since 1963 in Puerto Rico, and would discuss it with them. Appellant and Risco then went to Lorenzo's house, where they met Abreu and Lorenzo (178, 187, 197-202).

It was agreed that Risco could purchase 2 kilograms of cocaine for $20,000; $8,000 down, the balance to be paid later. Approximately two days later, appellant came by Risco's hotel and informed him that Abreu was outside with the 2 kilograms of cocaine. Risco then met Abreu, received the cocaine and travelled to New York, where he cut and sold the cocaine for $40,000. Thereafter, at the Commodore Hotel in New York City, Risco paid Abreu the $12,000 that was owed. Risco asked for more drugs and Abreu stated that "they didn't have any drugs, but that they would let him know . . . as soon as there was" (212-212, 238-245).

Sometime after June 21, 1970, Risco again travelled to Miami where he met with appellant and they discussed the purchase by Risco of heroin. Appellant said he had no drugs but was expecting some in a few days. Several days later, during which time Risco went to New York and then returned to Miami, appellant told Risco that he could only give him 1/2 kilogram of heroin because he (appellant) had many other obligations. Risco agreed and appellant brought 1/2 kilogram of heroin to Risco, who was staying in a hotel in Miami. Risco gave appellant $9,000 for this heroin. Thereafter, Risco returned

to New York City where he sold the heroin to a Cuban, named Adolfo Urda, for $12,000 (246-256).

In approximately July 1970, Risco returned to Miami and again met with appellant, at appellant's home. Appellant said Risco had arrived at a very good time because "there was heroin now". This time, Risco arranged to purchase two kilograms for $18,000 per kilogram. Risco had brought $20,000 with him. Appellant told him that the delivery would be made by Carlos Lorenzo. A few days later, Lorenzo went to Risco's hotel and delivered the two kilograms of heroin. Risco paid Lorenzo the $20,000; it was agreed that Risco would contact Domingo Abreu when he had the balance of the money, $16,000. Risco then transported this heroin to New York City where he ultimately sold it (257-268). Thereafter, he contacted Abreu and paid him $8,000 at the Hotel Commodore. (270-271). In the latter part of 1970, Risco returned to South America without having paid the outstanding balance of $8,000 (275).

2. The Defense Case

Appellant called as defense witnesses two Special Agents of the Drug Enforcement Administration, Anthony Bocchichio and Stephan J. Moran, and a former agent (now retired), Thomas Joseph Dugan. Each of these individuals testified as to statements that they had taken from various Government witnesses. These statements, which contained alleged inconsistencies, were admitted into evidence as prior inconsistent statements.

Additionally, appellant placed into evidence various other documents for impeachment purposes, including a photograph of Risco taken while he was incarcerated in an Ecuadorian jail on a murder conviction.

ARGUMENT

POINT I

The trial court correctly permitted the testimony of Rene Rosquette.

A. Introduction.

Appellant argues that the court erred in its denial of an alleged pretrial motion for the disclosure of the names of unidentified co-conspirators. Moreover, appellant contends that his failure to be so apprised denied him the right to effectively cross-examine Rene Rosquette and that it was error for the court to fail to grant him a further continuance to prepare for this cross-examination. Accordingly, so the argument runs, the court, having refused this request for a further continuance, should have granted his motion to strike Rosquette's testimony. Finally, appellant contends that this testimony should have been stricken because of certain missing documents pertaining to Rosquette.

B. Appellant, contrary to his assertion on this appeal, did not make a pretrial motion for the disclosure of unidentified co-conspirators.

In addition to a December 24, ~~1975~~ 1974 motion for the reduction of bail, then set at $1,000,000, only two other pretrial motions were made. The first was a motion for a continuance, filed on May 20, 1975 and heard by Judge Henry Bramwell (to whom the case was originally assigned). This motion was granted and the trial date was adjourned from June 16, 1974 until August 4, 1975. The second was a motion in limine directed at other crime evidence which the prosecutor had informally advised counsel that the government intended to offer into

evidence. Decision on this motion, filed July 22, 1975 and heard by Judge Watson on July 29, 1975, was reserved until trial, at which time it was granted; the other crime evidence was not allowed. There were no other pretrial motions—written or otherwise.

Indeed, during the May 23, 1975 argument on the motion for a continuance, there was discussion concerning the other crime evidence and a request was made concerning the identity of the witnesses as to this evidence. This was opposed and the court denied the request. Thereafter, in connection with the July 29, 1975 argument on the motion in limine, appellant sought disclosure of the nature of the other crime evidence. Appellant's counsel stated:

> "One thing that would help us in trying to figure out how to meet the [other crime] evidence and that would be simply to know who the witnesses are, who is going to testify to the uncharged other crimes.
>
> "There is an authority to order the Government to disclose a complete list of their witnesses. *We're only asking for witnesses of these other crimes evidence.*" (Emphasis supplied, Tr. of Hearing, July 29, 1975, p. 14).

The motion was denied. There, of course, was no prejudice since the other crime evidence was not permitted. At no time during this hearing, or indeed during other pretrial hearings, was a motion for the disclosure of unidentified co-conspirators made. Therefore, the issue concerning the failure to disclose such identities and whether such a motion would have been granted (or should have been granted) is simply not available on this appeal: there was no such motion and therefore there is no ruling to be reviewed.

C. . It was not error for the trial court to refuse to prohibit the testimony of Rene Rosquette.

On Thursday afternoon, August 14, 1975, the Government called Rene Rosquette as its third witness. At that time, a *Simmons*—type[7] hearing was conducted to determine the basis for Rosquette's expected identification of appellant. At the conclusion of his direct testimony, Rosquette's "3500" material was turned over to appellant (867). At that time, appellant's counsel indicated that he wanted to have an opportunity to inspect the Southern District of Florida court file pertaining to Rosquette.[8] Counsel stated to the court that he had caused a search to be made of the Florida records, but limited to materials concerning Claudina Leiros, Rosquette's co-defendant in the Florida case (865).

On the following morning, Friday, August 15, appellant moved for a continuance in order to reinspect the Florida records. During argument on the motion, it was conceded that on Tuesday, August 13, 1975, when Leiros testified that she had just seen Rosquette in the courthouse, that appellant "figured he is going to be on the witness stand" (877). In any event, the motion was granted and the case continued until Monday, August 18, 1975. Judge Watson, in order to facilitate examination of the file over the weekend contacted the Chief Deputy Clerk in the Southern District of Florida and made appropriate arrangements (892).

Thereafter, on August 18, 1975, before appellant could report the results of his search in Florida, the jury was excused for the day due to the illness of one juror (906).

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[7] *Simmons* v. *United States*, 390 U.S. 377 (1968).

[8] Rosquette had been convicted with co-defendant Claudina Leiros and others in the United States District Court for the Southern District of Florida in 1971.

Appellant then moved for an order that Rosquette not be permitted to testify because of "the failure of the Government to put defendant in a position where he could conduct appropriate preparation . . . and the inability for a continuance to serve any useful purpose in preparing us at this time to examine or meet the testimony of Mr. Rosquette" (907).

The basis of this motion was that appellant had been unable to obtain the minutes of Rosquette's 1970 bail reduction hearing; the transcript of the original trial; the minutes of his February 5, 1971 sentencing; a letter sent by Rosquette on June 6, 1973 to Judge Mehrtens; Southern District of Florida, requesting a sentence reduction; and the minutes of a November 4, 1974 hearing on Rosquette's motion for a sentence reduction which resulted in the vacating of the original sentence and placing Rosquette on probation with a special condition that he continue to cooperate with the Government. (903-911, 915-916, 943). It should be noted that appellant did obtain 15 documents from the Florida files which were marked for identification (Defense Exhibits L to Z).

These items, excepting the June 1973 letter and the November 1974 hearing minutes, had been destroyed by fire or inadvertently disgarded at the United States Court of Appeals for the Fifth Circuit at about the time of its June 2, 1972 decision in the Florida case (909). According to appellant, a three month wait was necessary to obtain the necessary transcripts since the original court reporter, who had a unique shorthand system, was on a vacation for that period of time (911).

Concerning the June 1973 letter, it was not entered in the Docket Sheet and was not in the extant court file. The only reference to it appears in a letter to Rosquette from Judge Mehrtens denying his application for sentence re-

duction, which letter had been turned over by the prosecution (Gov't Ex. 3500-65, 874). The former letter, however, could not be located. The remaining disputed item, the November 1974 hearing minutes apparently were not transcribed; although the record is silent as to whether the court reporter was available.

Treating the missing transcripts from the 1971 proceeding, i.e., bail hearing, trial, and sentencing, it is submitted that Judge Watson correctly held that "whatever material is missing, there has been sufficient material turned over by the Government and discovered by counsel to examine the witness on the question of credibility" (952). *Cf. United States* v. *Rosner*, 516 F.2d 269 (2d Cir. 1975). Moreover, appellant promised the court that "[w]e would certainly intend if there is a conviction in this case to find out three months from now what is in the transcript of the proceedings" (950). To date, almost six months after the jury delivered its verdict, this has not been done. This failure to produce the transcripts and to point to any portion therein that would have been of *any value*, significant or otherwise, to impeach the credibility of Rosquette, renders meritless the claimed error regarding the absence of these transcripts. Similarly, the failure to produce the transcript of the 1974 hearing requires the conclusion that this transcript, too, would have been of no additional value with regard to a witness whose credibility had already undergone serious attack.

With respect to the missing June 23, 1973 letter written by Rosquette to Judge Mehrtens, appellant was aware that Rosquette's 1973 request for sentence reduction, the subject of the letter, was denied by Judge Mehrtens. Indeed, the letter from Judge Mehrtens had been turned over to appellant. It was later that a new motion, dated May 16, 1974 (Defense Exhibit S) was

submitted, supported by letters from the United States Attorneys for the Southern and Eastern Districts of New York (Defense Exs. P and Q.) Certainly, appellant, through skillful cross-examination, was able to put before the jury the fact that Rosquette had made a bargain with the Government to cooperate. Judge Watson, who heard the testimony found that 'the defense has [not] in any way been disadvantaged by the failure to have any of the aforementioned material because it has . . . not prevented them from conducting a cross-examination based on the material that was available to them" (1155). It is submitted that the absence of this letter, missing from the Court files and not shown to have been in the prosecutor's possession, did not deny appellant the ability to conduct an effective cross-examination.

D. It was not error for the trial court to refuse a further continuance to permit further investigation of Rene Rosquette.

Appellant, upon the denial of his motion to prohibit Rene Rosquette's testimony, moved for a further continuance. This was denied (953-954).

Although the motion for a further continuance was denied, due to subsequent delays that occurred during the trial, appellant, in effect, had ample time to conduct further investigation. And if this additional investigation had been fruitful, Rosquette could have been recalled for further cross-examination.

On August 19, 1975, the day following the denial of the motion, the trial did not resume until 2:00 P.M. due to the fact that a juror had to visit her husband who had just undergone major surgery (819). Rosquette testified that afternoon, and on August 20, 1975 his testimony was completed and direct examination began of Ureta.

The trial was then adjourned from August 20, 1975 to Monday, August 25, 1975 on the motion of appellant's counsel, although this motion was opposed. This motion was made to permit Mr. Krieger to attend the Annual Conference of the National Association of Criminal Defense Lawyers in Cleveland, Ohio. This request had been made on August 11, 1975 and renewed on several occasions during the trial (467, 730, 1037-1043, 1220). The continuance therefore gave co-counsel, Joseph Beeler, Esq., a four day continuance during which to conduct further investigation, as needed.

Moreover, on the morning of August 26, 1975, just before the Government rested, Mr. Krieger took ill and was hospitalized. The trial was thereupon adjourned until his return on September 3, 1975, although co-counsel did make a daily appearance for the purpose of providing the trial court with a status report as to Mr. Kreiger's health. This unfortunate illness, therefore, in effect afforded appellant an additional week during which co-counsel could have caused further investigation to be made.

It is frivolous to now argue that the refusal to grant an additional continuance was prejudicial, especially in light of the additional time that appellant in fact obtained. Moreover, the fact that there has been no evidence presented in the approximately six months since the ~~week~~ date of the jury verdict establishes that such an investigation would not have produced anything of value to the defense. Certainly, there was no error in refusing the requested continuance.

E. It was not error for the trial court to refuse to strike Rosquette's testimony because the Government had lost his original Spanish language statement, and on the ground that the Government had mistakenly identified the agent who prepared another of Rosquette's statements.

Government Exhibit 3500-72A, a translation from original Spanish notes written by Rene Rosquette was turned over to appellant; however, Rosquette's original notes could not be found. Judge Watson, ruling on a motion to prohibit Rosquette's testimony pursuant to Title 18, United States Code, Section 3500(d), held that the non-production was not caused by the Government's "maliciousness or negligence" (1154). This ruling was correct. There has been no showing or suggestion that the translation was inaccurate or that there was any prejudice to the appellant. *Cf. United States* v. *Miranda*, — F.2d — (2d Cir. slip op. 6545; December 3, 1975.)

Moreover, the fact that, concededly, the Government mistakenly represented that Agent Dugan had prepared Government Exhibit No. 3500-75, was, at best, harmless error. Certainly, it was unfortunate that this mistake occurred, but under all the circumstances, including the wealth of material available for cross-examination of Rosquette, and in light of the overwhelming evidence of guilt, it is submitted that this error does not warrant reversal of the judgment of conviction.

POINT II

The failure to disclose that Government witness Risco had a fight with a fellow inmate did not violate due process and, in any event was harmless error since appellant was aware of the incident almost 10 days before the close of the Government's case and did not seek to have Risco recalled.

On August 18, 1975, six days after Wilfredo de Jesus Risco Dominguez completed almost five days of testimony as a Government witness, appellant's counsel notified the trial court that he had obtained "a copy of a report of incident"; "[i]t seems that on the morning that this trial began Mr. Risco apparently assaulted Mr. Pineda" (904). At the request of the prosecutor the report was marked for identification (Defense Exhibit J;[9] pp. 904-905). Without any further discussion of this matter, and without seeking to have Risco recalled for further cross-examination or seeking other relief, defense counsel turned to other issues. There was no further mention of this incident report until September 3, 1975, seventeen days later and seven days after the Government had rested.

At that time, on September 3, appellant offered the incident report into evidence as a defense exhibit. There

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[9] The text is as follows:

"While on duty in Pen Area I, William P. Saliski, heard a loud noise from the Pen Holding Area. I ran to the cell and observed [Risco] taking a swing at Gino Fantuzzi. I opened the cell and got between both men and took Fantuzzi out of the cell to another holding area.

"I observed Hugo Pinero [sic] with his right eye was swelling and a cut over his left eye. Pinero [sic] was taken to the nurse for treatment. Chief Devoy was notified. S.D.U.S.M. Ricks was notified. A.U.S.A. Fried was notified. Deputy Leary was also in pen area at time and assisted." (1502).

then ensued extended argument during which the prosecutor, having of course conceded that he had failed to disclose this report, objected to its introduction into evidence. Rather, he argued that if appellant wished to bring this matter before the jury, the proper method would be to recall Risco and cross-examine him about the incident. It was suggested that appellant could also call the other participants in the incident, inmates Pineda and Fantuzzi. This was rejected by appellant who urged that the report itself was admissible "not only to attack [Risco] but to attack the Government's entire case." The offer was denied by Judge Watson on the ground that "[t]he introduction of this [report] may be totally misleading" (1492-1504). It should be recalled that the report gave no indication of what had occurred except that Risco was observed "taking a swing at Gino Fantuzzi". There was no attempt by appellant to further inquire into the incident during the seventeen day period from the time the trial court was advised of the report and the time that the offer into evidence was made.

The trial court's refusal to permit the report in evidence was correct. Indeed, the prosecutor had fully disclosed Risco's extensive criminal background which included a murder conviction in Ecuador, a narcotics conviction in Colombia, the bribery of prison officials in both Ecuador and Columbia, a pending murder indictment in Puerto Rico, a robbery conviction in Puerto Rico, a narcotics conviction in the Southern District of New York, and a history of narcotics trafficking dating to the early 1960's. In light of this information, fully developed before the jury, the report, misleading and ambiguous as to what had actually occurred, was of insignificant impeachment value. This conclusion is buttressed by the fact that appellant's counsel, an experienced criminal attorney, chose to not recall Risco but waited seventeen days to even mention the document and then, merely sought to introduce it into evidence.

POINT III

The prosecutor, in his summation did not improperly, directly or indirectly, comment upon the failure of the appellant to testify.

Calling attention to certain remarks by the prosecutor in summation,[10] appellant contends that his Fifth Amendment privilege to remain silent at his trial was infringed. In order to treat this contention, it is necessary to set the prosecutor's remarks in proper context.

In his summation, appellant's counsel reminded the jury that in his opening he had promised to "prove to you beyond a reasonable doubt, ladies and gentlemen, that Claudina Leiros committed perjury. That is how much you trust her word" (1673). He then pointed out that: "[T]his case is a credibility case. This case can only be evaluated by looking at the witnesses and determining whether they told the truth" (1675). It was the defense contention "that no reasonable people can come to any other conclusion; that the testimony which has been adduced here is tainted, is almost depraved. Harsh words and I used them advisedly, because look at their sources." He then referred to each witness in turn, including Claudina Leiros (1676).

Thereafter, appellant's counsel rhetorically asked a number of questions concerning "why" Claudina Leiros had testified as to certain facts. Hard on the heels of these questions, he quoted Shakespeare: "Oh, what a tangled web we weave when first we practice to deceive" (1695). There was then extensive argument concerning a prior inconsistent statement relating to a particular date which was given to an Assistant United States Attor-

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[10] Set forth *infra* pp. 26-28.

ney. Indeed, counsel, at one point said that "she tried to repair [the inconsistency] and rather unsuccessfully". He also pointed out questions that were asked on re-cross examination concerning Leiros' understanding of perjury and the crime of making false statements to a federal agent. And the jury was then asked "how are you to determine whether Claudina Leiros is telling the truth in one instance or not."

Following through with his argument, counsel stated (1700):

> "I can see Mr. Fried just eagerly awaiting the opportunity to say but there is, there is. I have—I have such corroboration that Claudina Leiros was in Florida. Ladies and gentlemen, I have Ureta Morales. That's almost laughable. You lie, I'll swear on it. If Claudina Leiros lied, Ureta Morales had had to lie equally. They cannot exist except with each other. They do not reinforce each other. If Claudina Leiros was telling the truth to Mr. Schlam, she had committed perjury in this courtroom. If she had told the truth in this courtroom, she had committed perjury elsewhere."

Concluding this portion of his summation (1700) the jury was told, "[a]nd you are here now, asked by the prosecutor to deprive a fellow citizen of life and liberty, and on the word of an *admitted perjurer*, who perjures herself here, an *admitted perjurer* buttressed by an individual who would bury his wife to get out of jail" (emphasis added; 1701). It is important to note that at no time during cross-examination, did Claudina Leiros admit that she had committed perjury.

Later on, during the summation, following his discussion of other witness' testimony, counsel asked the jury "How do you pick and choose where the lies begin

and where the lies end?" He then turned directly to Leiros' testimony (1710). Several moments later, counsel predicted that the "Government's response to this, I assume [will be]:

> " 'Mr. Krieger says that these people fabricated a series of lies. Ladies and gentlemen, ladies and gentlemen, if they were lying, would they not have made up a tighter story?'
>
> "So to prove that they are not lying, you should credit their lies.
>
> "It's a circular argument. The more inconsistent, then the more consistent. Of course, if it dovetails—if it dovetails, Mr. Fried would then argue to you, "You see how truthful they are. Over the passage of time each one has told a—a relation of events that supports the others. So it amounts to a situation, there can be no wrong done. Whatever the witnesses say is true according to whichever argument Mr. Fried wishes to adopt. But that also strains an individual greatly." (1715-1716).

In response to this argument by appellant's counsel, the prosecutor, of course, spoke to the credibility of the Government witnesses. In evaluating this response, it is necessary to apply the rule as set forth in *United States ex rel Leak* v. *Follett*, 418 F.2d 1266, 1269 (2d Cir. 1969), *cert. denied*, 397 U.S. 1050 (1970): "[A] prosecutor, when provoked by an attack on the credibility of a government witness, may reply to the argument of opposing counsel, and in doing so may make statements which might otherwise be improper." The Court further held, that in such a situation "where the prosecutor confines himself to arguing the strength of his case by stressing the credibility and lack of contradiction of his witness,

we will not be astute to find in this a veiled comment in the defendant's failure to testify *even if in practical fact, although not in theory, no one else could controvert them.*" *Id.* at 1220 (emphasis added.)

Certainly, the prosecutor's argument concerning the credibility of the Government witness was not limited to the mere urging that they should be believed. Rather, the prosecutor is entitled to argue why the witness should be believed, otherwise the Government's rejoiner is not argument but merely declamation.

Therefore, the prosecutor, after arguing at some length the credibility of the Government witness (1772-1782) turned to appellant's argument that the witnesses were all lying to help themselves. After restating this argument, which had been advanced by appellant's counsel, the prosecutor made the following remarks:

> "Now, let's think about that for a second. First, let's consider, ladies and gentlemen, how does a person, how does a woman like Claudina Leiros, who is serving a 20 year sentence, think she can help herself by doing that? Doesn't she have enough trouble already with the law, she is in jail, she's been in jail for five years. How does she ever think that she can help yourself by coming in this courtroom and sitting at this witness stand testifying falsely?
>
> "Let's examine that for a second. Let's assume that she thinks she can do that, and let's assume she comes in this witness stand and she points—withdrawn. She comes to this witness stand and she is put under oath: Do you swear to tell the truth, the whole truth and nothing but the truth, so help you God?
>
> "Answer: I do.

"Then the prosecutor asks her the question: Do you [see] anybody in this courtroom with whom you dealt in narcotics when you were free on the street? She looks around the courtroom and she says, "That man back there with the glasses," she says, "I dealt with him in narcotics. I sold heroin to him and I bought heroin. The man in the rear. That's who it was was."

"Let's go a little further. Let's assume that the man in the room proves otherwise. When Claudina Leiros takes the stand she knows that a defendant in this country has the right to present evidence——

"Mr. Krieger: Oh, that is objectionable. I move for a mistrial. Griffin against California, if the Court please. That is outrageous in this court. Imposing a burden on the defendant!

"Mr. Fried: I am not imposing any such burden, your Honor. I am stating that a defendant has a right under this system to prove something.

"Mr. Krieger: That is inadmissible and is aggravated by the repetition. Mr. Fried is an experienced lawyer and he knows he can't do that!

"The Court: Motion denied.

"Mr. Krieger: I respectfully ask the Court to instruct Mr. Fried to conduct his summation within the rules of law.

""The Court: I'm sure Mr. Fried will do that.

"Mr. Fried: May I continue, your Honor?

"Let's further assume that it is established that that man in the back of the room with the glasses was in Europe and vacationing during the period of time that Claudina Leiros says that she dealt with him in narcotics, or let's assume that he was

> in a hospital—how can Claudina Leiros or a person like her ever think that that kind of testimony can benefit her? Think about that. How does she think that that kind of testimony can benefit her? Does she think that the government is going to be happy with such testimony?" (1783-1784)."

It is clear from the context in which the challenged remarks were made that the prosecutor was not focusing the jury's attention on appellant's failure to take the stand. In this case, where the entire thrust of defense counsel's summation was to attack the credibility of the Government witnesses, and where on numerous occasions he had singled out Claudina Leiros, the remarks by the Assistant were "fair rejoinder to defense counsel's argument in summation". *United States* v. *Lipton*, 467 F.2d 1161, 1167 (2d Cir. 1972), *cert. denied*, 410 U.S. 927 (1973). See also *United States* v. *Tortora*, 464 F.2d 1202 (2d Cir. 1972). Surely, the jury could not have taken the prosecutor to be commenting on appellant's failure to testify but rather on the fact that, in effect, Leiros' testimony, which uncontradicted should be believed and that because she was aware of the possibility of contradiction, she had a compelling reason to have testified truthfully.

In the light of this record, the response to defense counsel's objection by the prosecutor, "I am not imposing any such burden, your Honor. I am stating that a defendant has a right under this system to prove something." (1783) was, at worst, inartful. Quite clearly, the prosecutor was referring to the right of the defendant, if he so chooses, to produce evidence to contradict the prosecutor's case. This remark, without more, and in the context in which it was made was, if error at all, harmless. *United States* v. *Aloi*, 511 F.2d 585, 598 (2d Cir., 1975). Moreover, the trial court was not asked

for an immediate curative instruction but rather "to instruct Mr. Fried to conduct his summation within the rules of law" (1784). Nevertheless, in his charge, Judge Watson dispelled any possible prejudice. Judge Watson, while not specifically referring to this incident—which would have given the remarks made during an almost three hour summation unnecessary prominence—stated:

> "The burden of proving the defendant's guilt is on the Government. The Government must prove beyond a reasonable doubt every essential element of the offense charged in the indictment. A defendant has no burden to sustain. He is not required to testify. He is not obliged to nor must he prove himself innocent. Mere speculation, conjecture or suspicion is not sufficient to sustain the burden of proof placed on the Government." (1835-1836)

and then

> "The law does not compel a defendant to take the witness stand and testify and no presumption of guilt or inference of any kind is permitted to be drawn from the fact that the defendant did not testify. It would be a violation of your oath as jurors to speculate on why a defendant refrained from testifying. A defendant, being presumed innocent, has an absolute right to require the Government to establish his guilt beyond a reasonable doubt and in no way does a defendant have any burden in this trial" (1842).

The remaining objections to the prosecutor's summation are frivolous. Appellant complains that it was improper for the prosecutor to argue to the jury that defense counsel, in cross-examination of the Government witnesses had asked almost no question relating to the testimony implicating appellant. It is nonsense to con-

tend that such argument improperly placed a burden on appellant to contradict the Government's case. The comment was fair.

POINT IV

The trial court's charge to the jury was correct.

A. The Court did not err in refusing to give appellant's "Theory of the Defense" charge.

Appellant, by a written request, asked the trial court to give a "Theory of the Defense" charge which was as follows:

> "You are instructed that the defendant's position is that he was involved in the narcotics conspiracy. It is his position that the government witnesses must have falsely testified against him for reasons of their own, such as to obtain their own freedom from imprisonment by providing a target for prosecution other than themselves." (No. 11, Defendant's Requested Instructions to the Jury.)

After argument, during which appellant relied on *United States* v. *Vole*, 435 F.2d 774 (7th Cir. 1970), the trial court rejected this proposed charge. Judge Watson stated that in the *Vole* case, there had been evidentiary support for the charge in that case—a charge that the defense was that Vole had been the victim of a frame-up —while in the instant case "there's been no testimony have of like nature." Obviously, Judge Watson had found, as indicated by this remark, that there was no foundation in the record to support the requested charge. And this is the proper test.

In *United States* v. *Platt*, 435 F.2d 789 (2d Cir. 1970), this Court had held that as a defendant is en-

titled to have an instruction presented to the jury concerning "any theory of defense for which there is *any foundation in the evidence*" (emphasis supplied, *id* at p. 792). Moreover, as Judge Watson observed, there were no facts supporting the claimed theory of the defense. The fact that appellant's attorney in his opening told the jury that "[t]he only chance that [Ureta] and Leiros and others similarly situated have of getting out of jail where even Mr. Fried would concede they belong would be if they can replace their bodies" (45), an argument repeated in his summation (1672), but not supported by a shred of evidence does not elevate the argument of counsel to a theory of defense. Indeed, nowhere in his brief does appellant point to a single piece of evidentiary support for this contention.

Thus, there was no occasion for the trial court to give the requested instruction. See, *Laughlen* v. *United States*, 474 F.2d 444, 455 (D.C. Cir., 1972). Certainly, this is a far cry from *United States* v. *Vole*, *supra*, where there was testimony to the effect that Vole had been framed.

The jury could not have been misled by the refusal to give this instruction. Accordingly, there was no error.

B. The Court did not err in refusing to give appellant's "statute of limitations" charge.

Appellant also submitted a written request for a charge that:

> "If you believe the witness Rene Rosquette that there was a one kilo heroin transaction but that it occurred prior to December 12 of 1969 and you have a reasonable doubt as to the occurrence of the other alleged transactions or that there was in fact a conspiracy to commit those specific transactions then I instruct you that you must acquit

> the defendant of the charge in this case" (No. 12, Defendant's Requested Instructions to the Jury.)

This requested instruction was correctly rejected by the trial court.

As the statement of facts indicates, the Government's evidence, which consumed, including argument, almost 1450 pages of transcript, consisted of the proof of 9 narcotic transactions that the appellant had with four different individuals, either individually or jointly. In chronological order, the first transaction, according to Claudina Leiros had occurred "[a]pproximately at the beginning of December 1969" (547), and according to Rene Rosquette had occurred at "the beginning [of December], the first day," or "[t]he first days" (1096). Of course, if this was the entire case, the jury could have found relying solely on the Rosquette testimony that the transaction was barred by the statute of limitations which had run as to crimes committed before December 12, 1969. However, this was not the situation.

To contend that because one transaction arguably fell without the statute of limitations the jury might rationally have acquitted appellant ignores reality. It is whimsical to expect the jury to believe Rosquette only as to the one kilogram heroin transaction and then reject his testimony as to the 10 kilogram of cocaine transaction, which testimony served to corroborate that of Claudina Leiros. And, if the jury accepted Rosquette's testimony about the one kilogram of heroin, testimony which corroborated that of Leiros concerning the same transaction, it would be illogical for them to have rejected her testimony that she subsequently dealt with appellant on the 10 kilogram shipment. And of course Leiros, Ureta and Risco all testified to transactions that, if believed, unquestionably occurred within the limitations period.

To have singled out the Rosquette testimony and then "split" it in half, as appellant's request to charge would have done, could only have confused and misled the jury. Accordingly, this instruction was properly refused.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: March 10, 1976

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

PAUL B. BERGMAN,
BERNARD J. FRIED,
Assistant United States Attorneys,
Of Counsel.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

EVELYN COHEN, being duly sworn, says that on the 10th day of March, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a BRIEF FOR THE APPELLEE of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

Albert Krieger, Esq.	Joseph Beeler, Esq.
745 Fifth Avenue	2829 Bird Avenue
New York, N.Y. 10022	Coconut Grove, Miami, Fla. 33133

Joseph Beeler
c/o P.O. Box 549
Los Gatos, Ca. 95030

Sworn to before me this
10th day of March, 1976

Evelyn Cohen

Olga S. Morgan

OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

NOTICE that the within
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for

Action No.

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
is hereby admitted.
Dated: , 19

Attorney for

FPI-LC-5M-8-73-7355

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